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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/781,583	02/12/2001	Charley Y. Lloyd	5520USA(DBC) G180,140.101	9716
7590 10/23/2003			EXAMINER	
Douglas J. Taylor, Esq. P.O. Box 1113 Minneapolis, MN 55440			MADSEN, ROBERT A	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 10/23/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/781,583

Applicant(s)

LLOYD ET AL.

Examiner

Robert Madsen

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 July 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,4-7,10-15,19-24,32-40,43-50,53 and 54 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,4-7,10-15,19-24,32-40,43-50,53 and 54 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

DETAILED ACTION

1. The Response filed July 28, 2003 has been entered. Claims 1,4-7,10-15,19-24,32-40,43-50,53,54 remain pending in the application.

Response to Amendment

2. The Declaration filed on July 28, 2003 under 37 CFR 1.131 is sufficient to overcome the Ness et al. (US 2002/0192338 A1) reference. The rejection of claims 32-38 and 53 under 35 U.S.C. 103(a) as being unpatentable over Ness et al. (US2002/0192338B1) in view of Foehse et al. (US 5151283) is withdrawn.
3. The rejection of claim 7 under 35 U.S.C. 112, first paragraph, is withdrawn.
4. The rejection of claims 1,4-7,10-15,19-24,46-48 made under 35 U.S.C. 103(a) as being unpatentable over Dickerson (US 5706980) in view of Newarski (US 5727679) , Foehse et al. (US 5151283), and Perry et al. (1997) is maintained for the reasons of record in the Office Action mailed April 24, 2003.
5. The rejection of claims 21, 22, 24,46-48 made under 35 U.S.C. 103(a) as being unpatentable over Dickerson (US 5706980) in view of Kraig et al. (US 4515822) and Perry et al. (1997) is maintained for the reasons of record in the Office Action mailed April 24, 2003.
6. The rejection of claims 32-38,49,50,53,54, made under 35 U.S.C. 103(a) as being unpatentable over Dickerson (US 5706980) in view of Newarski (US 5727679) , Foehse et al. (US 5151283), and Perry et al. (1997) is maintained for the reasons of record in the Office Action mailed April 24, 2003.

7. The rejection of claims 39,40,43-45 made under 35 U.S.C. 103(a) as being unpatentable over Dickerson (US 5706980) in view of Newarski (US 5727679), Foehse et al. (US 5151283), and Perry et al. (1997) is maintained for the reasons of record in the Office Action mailed April 24, 2003.

Response to Arguments

8. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, applicant argues that because Dickerson suggests modifying the container to solve the problem of differing physical properties (i.e. flow characteristics) in cereals that there is no reason to modify the cereal of Dickerson.

9. Dickerson teaches puffed cereal and suggests a substantially uniform spherical shapes in the Figure. Even so, Dickerson acknowledges problems with flowability of food products. Foehse teaches conventional sphere-shaped puffed cereal, depending on whether or not the cereal includes a sugar coating, have density and diameters that fall with the recited ranges. Perry et al. teach providing a uniform diameter of spherical particles improves flow characteristics.

10. Given (1) Dickerson's suggestion of a sphere, (2) Dickerson's acknowledgement of flow problems related differing physical characteristics, and (3) Perry's suggestion that uniform diameters improve flow, one would be motivated to select uniform diameters for the spherical shapes of Dickerson because Dickerson teaches modifying the container to *aid* in the flowability of the food, and the teaching of Perry et al. further *aids*, or enhances, the flowability. Thus the combination of Dickerson and Perry et al. combined would offer the advantage of enhanced flowability of the food.

11. With respect to selecting the particular recited density range, Foehse teaches conventional densities of puffed cereals, which include the recited range. Additionally, as cited in the previous office action, applicant's attention was drawn to Figure 4, in which Foehse teaches a density of 262-295 g/100cu in, before sugar coating.

12. With respect to selecting the recited ranges, given that Perry et al. suggests a "uniform" diameter, selecting *any* "uniform" diameter range of Foehse would have been obvious.

13. With respect to applicant's argument that because Perry et al. state the large particles flow easier and thus one would not be motivated to select the recited diameter range. This argument is moot. It is noted that Perry et al. makes reference to fines being a problem and that pelletizing provides a "large particle", where large is relative to the size of a fine. It is noted that Foehse teaches puffed pellets of roughly spherical size, as cited in the previous office action (Column 8, lines 20-23).

14. With respect to arguments directed to claim 32, as discussed in the previous office action a "new product" may be obtain by removing unwanted particles from a

given product. The recited "new product" reads on a product consisting of pieces that are a desired size and resulted from the removal of at least one piece having a diameter larger than the desired size. As discussed above, the problem acknowledged by Dickerson and the teachings of Perry et al. motivate one to select "uniform" product sizes. It is notoriously well known in the art that one may "select" desired particle sizes from known product pieces by sieving technology. It is by this method that one would obtain a new product, having the same composition as a known product, but with a smaller particle size range. Foehse teaching a new ingredient formula is irrelevant and is relied on to suggest a puffed cereal piece diameter and density, as discussed above.

Conclusion

15. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

16. A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

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17. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

18. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

19. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen
Examiner
Art Unit 1761



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